



P O S E I D O N R E S O U R C E S

April 2, 2008

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SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD
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RE: Carlsbad Desalination Project (Order No. R9-2006-0065, NPDES No. CA0109223), April 9, 2008 Hearing, Agenda item #7

Dear Mr. Robertus and Dr. Wright:

I write to urge the San Diego Regional Water Quality Control Board ("Regional Board") to deny the request in the letter from staff of the California Coastal Commission ("Commission staff") to postpone action regarding the Revised Flow, Impingement and Entrainment Minimization Plan ("Plan") submitted by Poseidon Resources ("Poseidon"). This matter is scheduled for consideration by the Regional Board on April 9, 2008. Approval of the Plan is necessary for Poseidon to move forward with the proposed Carlsbad Desalination Project ("Project"), a critical source of water needed to help alleviate deteriorating water supply conditions in the region.

In its letter, Commission staff recommends that the Regional Board delay action on the Plan, even though Commission staff fails to raise any substantive issues with the revised Plan. Commission staff seems not to recognize that approval of the Plan will facilitate, rather than conflict with, conditions of project approval imposed by the Commission itself and will not prevent the Commission from requiring additional, non-conflicting mitigation measures. The revised Plan provides sufficient detail to meet its purpose of providing a "feasibility assessment," and additional mitigation details will be presented in a separate plan forthcoming after Regional Board approval of the Plan. The Commission will be involved in developing, reviewing, and approving this detailed mitigation plan, in which the option of on-site mitigation will be further analyzed.

Furthermore, the Plan relates to water quality, and its preparation was required pursuant to a permit ("Permit") issued to Poseidon by the Regional Board under the Porter-Cologne Water Quality Control Act and the National Pollutant Discharge Elimination System ("NPDES") program of the Clean Water Act. Accordingly, review and approval of the Plan lies solely within the Regional Board's purview and should not be delayed pursuant to the request of Commission

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staff – especially since the Commission approved the Project and issued a coastal development permit (“CDP”) to Poseidon in November 2007 after receiving and reviewing extensive information on all flow, impingement and entrainment submitted by Poseidon to the Commission.

Project Description

The Project is proposed to be located adjacent to the Encina Power Station (“EPS”) and, when constructed, will use the EPS’s cooling water system as source water for production of 50 million gallons per day of fresh drinking water. When both the EPS and the Project are operating, the EPS would discharge and provide to Poseidon an adequate volume of seawater for the operation of the Project. Under this mode of operation, the incremental impingement and entrainment effects and discharge impacts of the desalination plant are insignificant. The purpose of the Plan is to assess the feasibility of site-specific activities, procedures, practices, and mitigation measures to minimize impacts to marine organisms when the Project’s intake requirements exceed the volume of available from operations of the EPS.

The Permit Requires Poseidon to Submit the Plan for Regional Board Approval.

The Regional Board adopted the Permit on August 16, 2006. The Permit required Poseidon to submit, within 180 days of adoption of the Permit, the Plan to assess “the feasibility of site-specific plans, procedures, and practices to be implemented and/or mitigation measures to be taken to minimize the impacts to marine organisms when the Project requirements exceed the volume of water being discharged by the EPS.”¹ The Plan is subject to the approval of the Regional Board and must be modified as directed by the Regional Board. The Permit thus requires the Regional Board to decide whether to approve the Plan, subject to any modifications.

Poseidon Timely Submitted the Plan to the Regional Board in February 2007, and Iterations of the Plan Have Been Available for Public Review and Comment For the Past Thirteen Months.

To fulfill the requirements in the Permit, Poseidon submitted a draft Plan to the Regional Board on February 12, 2007. Subsequently, the Regional Board published the Plan on its website and notified interested parties and the public that the Regional Board would accept comments on the Plan for 45 days.

In response to comments of the Regional Board and interested parties (including Commission staff) on the original Plan, Poseidon submitted a revised Plan dated June 29, 2007, for the Regional Board’s review and approval. Again, the Plan was posted to the Regional Board’s website for public review over a 200-plus-day period. Poseidon met with Regional Board staff on August 14 and October 17, 2007 and January 28 and March 4, 2008 to discuss the status of the Regional Board’s review of the revised Plan. On February 19, 2008, Regional Board staff provided Poseidon with its final written request for information to clarify the Plan.

¹ Permit at F-48.

On March 6, 2008 – thirteen months after the original, timely submittal of the Plan – Poseidon submitted the final draft Plan responding to the Regional Board staff's request, along with a summary of the changes made to the document in response to the Regional Board staff's comments. The Regional Board published these documents on its website on March 7, 2008 and scheduled an April 9, 2008 hearing for consideration and approval of the Plan.

Commission Staff Has Identified No Substantive Issues With the Revised Plan Despite a Lengthy Nine-Month Review and Comment Period and Direct Submittal of the Plan to Commission Staff.

Although Commission staff plainly has had ample time since June 2007 to review and comment on the revised Plan and the associated entrainment study, Commission staff has not identified a single substantive issue with the revised Plan. In addition to the general 9-month public review process during which Commission staff could have reviewed and commented on the revised Plan, Commission staff also had the opportunity to review the Plan after specifically requesting a copy of it from Poseidon during the CDP approval process. In response to Commission staff's request, Poseidon provided the revised Plan to Commission staff in June 2007.

Despite the lengthy review and comment period, Commission staff has failed to identify a single substantive concern about the Plan. That Commission staff has not provided comments on the revised Plan to the Regional Board despite this nine-month review period, and that Commission staff plans not to attend the hearing at which the Plan will be considered for approval by the Regional Board, further underscores the fact that Commission staff lacks any substantive basis to object to the Regional Board's action on the Plan at its April 9th hearing.

The Regional Board's Approval of the Plan Will Further Compliance With Existing Commission Requirements, Rather Than Create Conflict, As the Commission Suggests.

Regional Board approval of the revised Plan does not preempt the Commission from overlaying additional non-conflicting mitigation requirements onto those required by the Regional Board. The Commission can impose conditions of approval "to ensure" that a project "will be in accordance with the provisions of [the Coastal Act]."² The CDP issued to Poseidon by the Commission in November 2007 contained such a condition of approval requiring Poseidon to "submit to and obtain from the Commission approval of a Marine Life Mitigation Plan." The revised Plan recognizes that by imposing this condition of approval, the Commission "is insuring that Poseidon will provide the mitigation needed to address Project related impacts in a manner consistent with applicable Coastal Act provisions."³

² Cal. Pub. Res. Code § 30607.

³ Plan at 6-9.

The revised Plan acknowledges that the Commission's condition of approval has very specific requirements for the Marine Life Mitigation Plan, including:⁴

- specify "goals, objectives and performance criteria for each of the proposed mitigation sites";
- "identify specific creation, restoration, or enhancement measures that will be used at each site, including grading and planting plans, the timing of the mitigation measures, monitoring that will be implemented to establish baseline conditions and to determine whether the sites are meeting performance criteria";
- "identify contingency measures that will be implemented should any of the mitigation sites not meet performance criteria";
- "provide 'as-built' plans for each site and annual monitoring reports for no less than five years or until the sites meet performance criteria"; and
- identify "legal mechanism(s) proposed to ensure permanent protection of each site – e.g., conservation easements, deed restriction, or other methods."

Approval of the revised Plan will not prejudice the Commission's ability to require Poseidon to prepare a Marine Life Mitigation Plan containing these elements. In fact, the revised Plan specifically contemplates and provides for compliance with the condition of approval by stating that after the Regional Board approves the revised Plan, Poseidon will submit a more specific mitigation plan that will fully present all details of the mitigation. Explicitly required components of this detailed mitigation plan include the specific requirements of the Commission's condition of approval.⁵ Accordingly, Regional Board approval of the revised Plan will not conflict with or hinder – and, to the contrary, will facilitate – the Commission's implementation of the Coastal Act.

The Revised Plan Provides Sufficient Detail to Fulfill Its Purpose of Assessing Feasibility, and More Detailed Mitigation Options Will Be Analyzed After Regional Board Approval of the Plan.

The revised Plan was not designed to present a great amount of detail regarding mitigation options. Commission staff complains in the letter that the revised Plan's "mitigation options do not include enough certainty or detail to determine how they will actually mitigate for the anticipated impacts." The Regional Board, however, directed Poseidon to prepare the Plan to "assess the *feasibility* of site-specific plans, procedures, and practices to be implemented and/or mitigation measures"⁶ The revised Plan provides such a *feasibility* assessment, in response to Regional Board requirements.

Instead of presenting detailed mitigation options in the revised Plan, these options will be included in the detailed plan to be prepared after the Regional Board approves this revised Plan.

⁴ Plan at 6-9, 10.

⁵ Plan at 6-9.

⁶ Permit at F-48.

The detailed mitigation plan that will be prepared after Plan approval will meet all agency requirements and will provide the level of detail Commission staff requests. It would well exceed the required scope of the Plan and its purpose of providing a *feasibility* assessment for the Plan to provide the level of detail that Commission staff demands.

The Commission Has Authority to Review and Approve the Detailed Mitigation Plan to Be Prepared After Approval of the Plan Currently Before the Regional Board.

The revised Plan specifically contemplates and provides for ongoing review and approval of the detailed mitigation plan by both the Commission and the Regional Board. The Plan states that Poseidon “recognizes that mitigation requirements and regulations of the various review agencies differ, and additional agency coordination is required to insure that needs of all applicable agencies are addressed.”⁷ The revised Plan “provides for additional coordination with the regulatory agencies,” including the Commission and the Regional Board.⁸

After Regional Board approval of the Plan, Poseidon will document “mitigation program implementation details” for review and approval by the interested agencies, including the Commission.⁹ The revised Plan outlines a schedule for coordination with interested agencies regarding mitigation plan implementation details, as well as review and approval of the detailed mitigation plan by the interested agencies. The details of mitigation would be established through this collaborative process. “Agency review of implementation details” contained in the mitigation plan would occur in May 2008; further “agency review and approval” would occur in June 2008. Accordingly, after the Regional Board approves the Plan, Commission staff still will have the opportunity to comment on the detailed mitigation plan, which must incorporate specific Commission requirements.

In addition to being reviewed by both Commission staff and Regional Board staff during its development, the detailed mitigation plan will be submitted to the Commission and the Executive Director of the Regional Board for approval. The Commission’s approval of the detailed mitigation plan is expected to occur at the Commission hearing scheduled for July 2008.¹⁰ Thus, after Regional Board approval of the feasibility assessment provided in the revised Plan, scheduled for the April 9th hearing, both Regional Board staff and Commission staff still must coordinate to develop, review, and approve the specific mitigation details. In fact, the Commission’s approval of the Marine Life Mitigation Plan, all the requirements of which will be included in the detailed mitigation plan, is a precondition of the issuance of the final CDP for the Project.

⁷ Plan at 6-2.

⁸ Id.

⁹ Plan at 6-3.

¹⁰ Id.

Because the Commission has full authority to review and approve the Marine Life Mitigation Plan, which will include all explicitly mandated elements of the Commission's condition of approval and will therefore provide certain and detailed mitigation measures, Commission staff has no reason to object to the Regional Board's approval of the Plan, which sets forth a framework for preparing the detailed mitigation plan.

The Revised Plan Allows Further Exploration of On-Site Mitigation Options, the Preferred Approach Expressed By Commission Staff.

On-site mitigation has not yet been identified as a feasible mitigation option for Poseidon, but the revised Plan provides for further research into on-site mitigation opportunities. The revised Plan contains a detailed description of Poseidon's efforts to identify feasible restoration projects on-site in Agua Hedionda Lagoon. In August 2007, Poseidon sent "Requests for Expressions of Interest" to 77 public and private entities and individuals that are involved in, have jurisdiction over, or interest in wetlands restoration in the San Diego region. Through this effort, Poseidon received a total of eight mitigation proposals. Three proposals involved proposed mitigation projects in the Agua Hedionda Lagoon watershed; however, none of these proposals addressed the primary purpose of the mitigation project – restoration of marine wetlands. Because these proposals did not meet the mitigation project objective, they were not considered further.

Because investigations to date have not resulted in the identification of any mitigation opportunities within Agua Hedionda Lagoon that meet the basic marine wetlands restoration objectives of the Plan,¹¹ proposed mitigation includes a core off-site project that meets the Plan goals and objectives. This mitigation project, located in San Dieguito River Valley adjacent to the marine wetlands restoration project implemented by Southern California Edison as mitigation for the entrainment and impingement impacts from its San Onofre Power Plant, is being developed in parallel with continued effort to identify feasible mitigation opportunities in Agua Hedionda Lagoon.

In addition to the core off-site mitigation project, the revised Plan sets forth a mitigation plan that includes additional coordination activities either (1) to identify if new mitigation options within Agua Hedionda Lagoon have arisen since Poseidon's last Requests for Expressions of Interest or (2) to confirm the lack of on-site mitigation opportunities.¹² If mitigation opportunities within Agua Hedionda Lagoon have arisen, and such mitigation is determined to be feasible, Poseidon will coordinate with regulatory agencies – including the Commission – to implement such mitigation.¹³ If Agua Hedionda Lagoon mitigation that meets the objectives is confirmed to be unavailable and infeasible, Poseidon will implement the

¹¹ Plan at 6-10-14.

¹² Plan at 6-2

¹³ Id.

proposed off-site mitigation project.¹⁴ In the meantime, however, on-site mitigation remains as an option to be further explored after approval of the Plan.

Approval of the Revised Plan Is Solely Within the Regional Board's Jurisdiction and Should Not Be Delayed By the Commission.

Although the Plan facilitates the implementation of the condition of approval requiring preparation of a Marine Life Mitigation Plan, imposed by the Commission to assure compliance with the Coastal Act, review and approval of the Plan is solely within the Regional Board's – not the Commission's – purview. Because the Plan relates to water quality and its preparation was required pursuant to an NPDES permit issued under federal and state water quality laws and regulations, the Regional Board is the entity charged with the responsibility under the Water Code to determine whether Poseidon's Plan is complete, not Commission staff.¹⁵

Over the thirteen-month period since Poseidon first submitted the Plan and the associated entrainment study to Regional Board staff, staff has extensively reviewed the entrainment study and confirmed that it conforms to protocol previously developed and approved by the Regional Board staff. The Regional Board staff not only has the authority to do this, but it also has specialized expertise related to entrainment studies that other agencies do not.

Because the Regional Board has primary water quality authority, it need not – and should not – comply with Commission staff's request to delay approving a Plan prepared to meet its own requirements.

It Is Beyond the Commission's Jurisdiction to Suggest That the Plan Address Water Quality Issues Not Related to the Objectives of Poseidon's Mitigation.

Commission staff's suggestion that Poseidon's mitigation may assist in compliance with NPDES permits or in affecting the listing of water bodies listed as impaired pursuant to Clean Water Act section 303(d) well exceeds not only the objectives of Poseidon's mitigation but also the Commission's jurisdiction. It is within the jurisdiction of the Regional Board, as the state's primary water quality control agency, to determine the best means of addressing issues related to NPDES permits and Clean Water Act section 303(d), not the Commission.

Commission Staff's Request That the Regional Board Delay Approval of the Plan Appears to Be Part of a Broader Effort to Delay Action on Poseidon's Project.

On repeated occasions, Commission staff has asked this agency and others to refrain from acting on the Project. As it has done here, Commission staff has in the past urged decision-makers to not act on the Project just prior to a hearing on the Project: the City of Carlsbad Planning Commission (draft Environmental Impact Report ("EIR")); the City of Carlsbad City Council (Final EIR); and the Commission (CDP). At each of these hearings, the decision-makers

¹⁴ *Id.*

¹⁵ See Cal. Water Code § 13001; Cal. Pub. Res. Code § 30412(b).

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approved the project despite Commission staff objection – including the hearing on the CDP, at which the Commission approved the CDP after disregarding Commission staff's recommendation to deny it. If the City of Carlsbad and the Commission had denied or postponed approval of the Project, this critically needed water supply source could still lack a certified EIR and the CDP. Poseidon would be years, rather than months, away from concluding a thorough regulatory approval process that already has extended five years.

Expedient Regional Board Action on the Plan Is Necessary to Facilitate Timely Construction and Operation of the Project, a Reliable Source of Water During a Severe Water Supply Shortage.

The San Diego County Water Authority ("SDCWA") and its member agencies have acknowledged that the Project is necessary to provide much-needed water in the San Diego Region. As the Regional Board is no doubt aware, the region is currently experiencing a severe water supply shortage due to overtaxed imported water supplies and ongoing drought conditions throughout the West. The Metropolitan Water District of Southern California and the SDCWA and its member agencies are aggressively pursuing the development of additional local supplies to alleviate the shortage. One such supply that is a cornerstone of the SDCWA's Water Resources Plan is the Project. The immediate and pressing state, regional, and local water needs instill a sense of urgency in finalizing review and approval of the Plan.

Conclusion

In closing, it is important to note that every regulatory agency that has reviewed the project, including the Commission itself, has determined the project to be necessary and environmentally sound. For the Commission staff to request, and receive, further delay of Regional Board approval of the Plan would harm the public without benefiting the environment.

In light of the foregoing, we respectfully request that the Regional Board deny Commission staff's request to postpone a hearing on the Plan and instead continue the review and the approval of the Plan, as it is required to do by the Permit.

Sincerely,



Peter MacLaggan
Senior Vice President

cc:

David King, Vice Chairman
Susan Ritschel, Board Member
Eric Anderson, Board Member
Wayne Rayfield, Board Member
Elizabeth Pearson-Schneider, Board Member

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Kris Weber, Board Member

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